

NTSB Order No. EA-3914

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of June, 1993

Docket SE-8577

Respondent appealed the Board's order to the United States Court of Appeals for the District of Columbia Circuit and, on January 15, 1993, the Court of Appeals issued its decision on that appeal.² In that decision, the court ruled that the Board, in reinstating the 60-day suspension of respondent's airman certificate, had deferred to an FAA policy bulletin³ pertaining to the assessment of sanctions for unauthorized TCA incursions that was "not publicly available" at the time the flight in question took place. Consequently, in the court's opinion, the Board had run afoul of the Administrative Procedure Act (APA) provision that prohibits reliance on administrative manuals and instructions which have not been "ma[de] available to the public."⁴ The court, therefore, vacated NTSB Order EA-3213 and remanded the case to the Board "for further proceedings consistent with . . . [its] opinion." Slip op. at 6.

In view of the Court of Appeals' decision, the Board will now allow the law judge's initial decision on sanction to stand. A lesser sanction is not warranted in this case because respondent did not, in his appeal to the Board, object to the 45-day suspension that was ordered by the law judge in the initial decision.⁵

(..continued)

respondent for such violations.

²Smith v. Nat'l Transportation Safety Bd., Civ. No. 91-1013.

³Bulletin 86-2.

⁴The APA provision cited by the Court of Appeals is found at 5 U.S.C. § 552(a)(2). We would caution readers of the court's opinion that the court attributes arguments to the NTSB that are actually those of the Administrator's counsel. As the NTSB ordinarily plays no role in the appeals of its orders, we did not have either the occasion to review those arguments or the opportunity to present the Court of Appeals with our views concerning the applicability of the cited APA provision.

⁵The Court of Appeals' decision in no way reverses or modifies the Board's affirmance of the findings of the FAR §§ 91.90(a)(1)(i) and 91.9 violations in NTSB Order EA-3213. While we note that all unauthorized TCA incursions are potentially hazardous, we believe that the violations arising from respondent's TCA incursion in this case are especially serious in nature because that incursion resulted in part from his use of a navigational chart which he knew was obsolete. Thus, respondent's §§ 91.90(a)(1)(i) and 91.9 violations were easily avoidable and, as we previously observed, were the result of an action that was "inherently dangerous and inexcusable." See NTSB Order EA-3213 at 5 n.9.

ACCORDINGLY, IT IS ORDERED THAT:

1. The law judge's initial decision of May 5, 1988 is hereby affirmed in its entirety.
2. The Administrator's order of suspension is affirmed, except as modified by the law judge;
3. The Administrator's appeal from the initial decision is denied; and
4. The 45-day suspension of respondent's airman certificate with commercial pilot privileges shall begin 30 days from the date of service of this order.⁶

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above order.

⁶For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f). (The effectiveness of NTSB Order EA-3213 had previously been stayed pending judicial review, under NTSB Order EA-3252 (served January 29, 1992).)